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ABSTRACT

Collective bargaining is merely a process for reconciling the expectations of two parties in order to arrive at a written contract, according to the author. His paper describes the bargaining process, following chronologically its major steps. The paper begins with a discussion of the recognition and certification of teacher unions. The next chapter focuses on the scope of bargaining, including the range of subjects that can be bargained between teachers and boards of education. Next the author describes what actually happens at the bargaining table and the methods used to resolve bargaining impasses between the parties, including mediation, fact-finding, arbitration, and strikes. The final chapter describes grievance procedures used to enforce the collective bargaining agreement. He bolsters his presentation with references to statutes and court cases bearing on collective bargaining. (Author/DS)

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Collective Bargaining in the Public Schools

Thomas J. Flygare

FASTBACK 99

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Collective Bargaining in the Public Schools

By Thomas J. Flygare

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Introduction

During my first year as a teacher, the faculty members held an election to select a bargaining representative. Up until that time the terms of the teaching contract had been decided between the school administration and a faculty "senate." Some dissatisfaction with salaries and working conditions had developed, however, and a group of teachers requested that the state conduct a representation election. It turned out to be a bitterly fought contest between the National Education Association (NEA) and the American Federation of Teachers (AFT). Fortunately, I was on the winning side and eventually became a state officer and lobbyist for the organization selected as the bargaining representative. I mention these facts lest the reader assume that mine is purely an academic interest in teacher collective bargaining. Thus, while this fastback is based on recent research and is intended to be an objective description of the present status of collective bargaining in education, it inevitably bears the imprint of my early experience.

The organization of this fastback is simple, following chronologically the major steps in the collective bargaining process. The fastback begins with a chapter on the recognition and certification of teachers unions. Next is a chapter on the scope of bargaining, focusing on the range of subjects that can be bargained between teachers and the school board. Following that is a chapter on the bargaining process that attempts to describe what actually happens at the bargaining table. Next is a chapter on the methods used to resolve bargaining impasses between the parties. The final chapter describes grievance procedures used to enforce the collective bargaining agreement. But, before moving to these topics, the reader may find the following brief description of the legal status of educational collective bargaining to be helpful.

When Congress passed the major pieces of modern labor legislation—the National Labor Relations Act of 1935, the Fair Labor Standards Act of 1938, and the Taft-Hartley Act of 1947—government workers at all levels were excluded from coverage. This is really not surprising, because at the time these laws were enacted public employees, including teachers, were a small part of the labor force and were not widely organized into units pursuing collective bargaining objectives. Since then, however, many factors have changed. The number of public employees has grown dramatically, greatly outstripping the growth rate of the nation's population. Today approximately 15 million workers in the United States collect their paychecks from a government employer. That represents one out of every five workers. Moreover, government workers are now much better organized than they were three or four decades ago. Labor organizations abound today, and in some areas and in some occupations have succeeded in attracting most government workers into unions. Teachers are a prime example: Eighty percent at the public elementary and secondary level are now members of either the NEA, which has about 1.7 million members, or the AFT, with about 500,000 members. And the public employees unions are considerably more militant than in the past, even going so far as to virtually close down some state governments for short periods.

Despite these trends, no legislation has been passed by Congress to govern collective bargaining for public employees. Collective bargaining for federal workers has been permitted by a Presidential executive order, but the governance of labor relations for state and local employees has been left entirely to the states. Predictably, the 50 states have developed incredibly diverse ways of handling this regulation. With reference to collective bargaining for teachers, the states can be roughly divided into three categories. About 20 states still have no laws granting teachers the right to discuss working conditions with school boards. It is generally held in these states, however, that in the absence of an express statutory prohibition, school boards may negotiate with teacher representatives. However, the Virginia Supreme Court recently struck down all collective bargaining agreements by units of local governments on the grounds that the legislature had not authorized such agreements. About 15 states have laws requiring school boards to "meet and confer" with teacher representatives. The rights of teachers in these states are

quite limited; the school board usually establishes the agenda and there are no impasse resolution mechanisms such as fact-finding or arbitration. The remaining states—about 15—have attempted to deal with the question in a somewhat comprehensive fashion. Many have laws which prescribe the selection of exclusive bargaining representatives, the issues that the school boards must negotiate with the teachers, and the procedures for impasse resolution.

This patchwork approach to teachers collective bargaining has spawned support for a federal law governing the labor relations of state and local employees. Backers of such a federal law describe the need for a stable, legal relationship between labor and management in the public sector. This stability has not been achieved, because of the inconsistencies in collective bargaining laws among the states as well as the constant changes in these laws. Proponents of a federal law cite the exemplary record of the federal government and its employees, based on uniform and very stable provisions governing labor relationships in the federal service. Opponents of such a law argue that it would be unconstitutional, based on a 1976 decision of the U.S. Supreme Court in *National League of Cities* v. *Usery*, which held that Congress had exceeded its constitutional authority in 1974 when it extended the minimum wage and maximum hour provisions of the Fair Labor Standards Act to state and local governmental workers. But even if a federal collective bargaining law for public employees were within the authority of Congress, its opponents argue that it would be unwise from a policy standpoint. They point out the unfortunate results of federal incursions into other areas and say that a federal law would stifle the efforts by the states to deal with the difficult issues of public worker collective bargaining in novel and potentially more effective ways. Several bills establishing federal standards for state and local collective bargaining have already been introduced in Congress. To date, sufficient support for such bills has not materialized. But with the increasing political clout of public employees unions, most of which support a federal law, such a law may eventually emerge from Capitol Hill.

Until then, however, the legal issues of public employees collective bargaining are primarily a matter of interpreting and applying state statutes. Under our legal system these questions are within the purview of the state courts. Frequently, however, collective bargaining disputes occur involving a claim, such as free speech,

arising out of the U.S. Constitution. These kinds of disputes can be resolved by the federal courts and ultimately by the U.S. Supreme Court. Accordingly, in the pages that follow, while the principal emphasis will be on the elements of teacher collective bargaining as determined by the state legislatures and state courts, attention will also be paid to federal constitutional principles that affect labor relations in the public schools.

Let me explain a few terms. Although there once was a silly semantic dispute about whether teachers engaged in "professional negotiations" or "collective bargaining," these terms will be used synonymously in this fastback. "Management" refers to the board of education and the administration. "PERB" is an acronym for public employment relations board. This is an agency established by many states to administer the public employee collective bargaining law. While the actual title of this agency may vary among the states, for the purpose of simplicity each such agency will be referred to as a PERB. Finally, "union" will be used often to describe teachers organizations; it is applied equally to affiliates of both the NEA and the AFT.

Recognition and Certification of Teachers Unions

Teachers, like employees in the private sector, have a constitutional right to organize and select representatives. Where more than one such organization exists, however, as is almost invariably the case in schools today, the problem arises as to which organization should represent the teachers at the bargaining table. Certainly the teachers would not be satisfied if the school board arbitrarily selected one teachers group over the others for bargaining purposes. Minnesota attempted to solve this problem by requiring that the teacher bargaining "team" be composed of representatives from the rival teachers unions in proportion to the number of faculty members belonging to each union. This arrangement proved unsuccessful when the teacher representatives argued more with each other than with the school board. The more conventional method, at least in those states which endeavor to provide teachers with adequate collective bargaining rights, is to allow the school board to recognize one teachers union as the *exclusive* bargaining representative for the teachers. If there is sufficient dissatisfaction with the board's choice, the teachers can usually petition the state PERB, which will then conduct a representation election. (In non-PERB states, a private organization like the American Arbitration Association may conduct the election.) The school board is usually required to bargain in good faith with the teachers organization certified by the PERB as the winner of such an election.

The Exclusive Bargaining Representative

The policy of allowing teachers to select an exclusive bargaining representative has raised a number of legal problems. For the representative selected, this recognition or certification normally

carries with it a number of collateral privileges in addition to sitting at the bargaining table. These privileges resulted in a recent lawsuit in Memphis, Tennessee. The school board had recognized the Memphis Education Association (MEA), to which 90% of the system's teachers belonged, as the exclusive bargaining representative. As such, the MEA was permitted to use the school mail service, faculty mailboxes, school bulletin boards, payroll deduction for membership dues, and school facilities for meetings. The Memphis American Federation of Teachers (MAFT), claiming about 5% of the system's teachers as members, sought but was denied the same privileges. The MAFT filed suit alleging that the school board's refusal to grant it the privileges enjoyed by the MEA was an abridgment of the MAFT's freedom of speech as well as a denial of equal protection. The federal district court rejected the free speech claim but agreed that the MAFT members had been denied equal protection. The district judge ordered the school board to allow any teachers organization with membership exceeding 225 (MAFT had about 300 members) to have the same collateral privileges as the MEA. The school board appealed to the U.S. Court of Appeals, Sixth Circuit, which reversed the lower court. The Sixth Circuit held that the school board needed only a rational basis to justify the denial of collateral privileges to MAFT. It found a rational basis in the school board's desire to promote labor peace and stability by providing only the exclusive bargaining representative with school facilities and services [*Memphis American Federation of Teachers* v. *Board of Education* (1976)]. The same outcome was reached in similar suits in Delaware, Colorado, and Connecticut.

The need for labor peace in public education has also been used to support the claim by an exclusive bargaining representative in a Nevada school district that a rival teachers organization should not be permitted to solicit members on school premises. The bargaining representative argued it had an "exclusive use" agreement with the school board that barred a competing organization from conducting membership drives inside the schools. The rival organization asserted that such an interpretation of the "exclusive use" provision would be an infringement of equal protection. The Nevada Supreme Court affirmed the interpretation of "exclusive use" advanced by the bargaining representative and held that such an interpretation was consistent with a "compelling governmental interest" in labor

peace [*Clark County Classroom Teachers Association v. Clark County School District* (1975)].

The U.S. Supreme Court, however, was not persuaded by the "labor peace" argument in a case decided recently. Madison Teachers Inc. (MTI) was the exclusive bargaining representative for teachers in Madison, Wisconsin. MTI had proposed a contract containing a section requiring "agency fee" payments—equal to MTI dues—from teachers who were not MTI members. The agency fee was designed to force nonunion teachers to bear a part of the collective bargaining costs. Before bargaining had been concluded, Al Holmquist, a nonunion teacher opposed to the agency fee proposal, appeared over the objection of MTI at a regular public meeting of the school board. He reported to the board the results of an informal survey showing that many Madison teachers were opposed to agency fees and urged that consideration of the proposal be postponed for a year pending study by an objective panel. He spoke for approximately 2½ minutes. MTI filed an unfair labor practice complaint with the state PERB alleging that, by permitting Holmquist to speak on an issue under negotiation, the board had violated MTI's rights as exclusive bargaining representative. The board responded by asserting that Holmquist had a citizen's right through the freedom of speech clause of the U.S. Constitution to address the board at a public meeting.

The case ultimately reached the U.S. Supreme Court. When MTI's attorney told the Court that the suppression of Holmquist's free speech was necessary to prevent danger to labor peace, one Justice responded: "What danger?" This attitude pervaded the Court's decision. It held that even if danger to labor peace might "in some circumstances" justify the suppression of a teacher's right to address the school board, the facts in this case did not prove that any substantial danger existed. In the Court's view, Holmquist was not "negotiating" with the board, as MTI asserted. The Court noted that Holmquist did not hold himself out as the representative of any group that authorized him to bargain on its behalf. Accordingly, the Court could not construe Holmquist's speech as "negotiating" in a way that would materially interfere with MTI's exclusive right to enter into a collective bargaining agreement with the board [*Madison Teachers Inc. v. Madison Board of Education* (1976)].

The *Madison Teachers Inc.* case could have significant repercussions for public employee collective bargaining. The Court held, in effect, that even in those states like Wisconsin that provide for certification of an exclusive bargaining representative, nonunion or dissident employees have a constitutional right to address management on issues currently being negotiated. In education, where the rivalry among teachers unions is often fierce, the impact of this case may be even more dramatic. If the teachers organization that is not the bargaining representative is displeased with the proposals advanced by the majority organization it is now free to inform the school board of, among other things, the reasons for rejecting the bargaining representative's proposals as well as the numerical strength of teacher opposition to the proposals. This may allow the board to gauge the degree of teacher disunity and to approach the bargaining table with the upper hand. Sophisticated combatants in educational collective bargaining may argue that school boards have always been able to obtain data on teacher disunity from friendly teachers, so the Supreme Court decision will really not change much. Only experience will tell us if this case will have a major impact. It should be noted, however, that the Supreme Court declined to hold that the maintenance of "labor peace" could never be invoked to suppress dissident teachers' communication with the school board. It found that the facts in this particular case did not justify such suppression. This, of course, leaves open the possibility that if sometime in the future open dialogue between dissident teachers and the school board seriously disrupts the rights of the exclusive bargaining representative, the courts may sanction some limited curtailment of the dissident teachers' right to speak to the board.

Because "closed shop" or "union shop" arrangements are not permitted in the public sector, there are almost always members of the faculty who, like Holmquist, do not belong or pay dues to the union selected as the exclusive bargaining representative. Nonetheless, as members of the faculty, these teachers are entitled to benefits secured by the bargaining representative. That is, as a corollary to its status as exclusive bargaining representative, the dominant teachers union is compelled to represent and protect teachers who are members of rival unions and teachers who are members of no union. This situation points up two additional issues. The first is the

legality of the "agency fee" arrangement discussed briefly above in connection with the Holmquist case. The second is the effort to define the "duty of fair representation" owed by the bargaining representative to all teachers.

Agency Fee

An "agency fee," sometimes called "fair share," is a monetary charge against teachers not belonging to the union that is doing the bargaining. It may be equivalent to full dues and is charged even if a teacher is paying dues to a rival union. Sixteen states and the District of Columbia currently have laws permitting agency fee agreements. It is generally held that such agreements are illegal in the absence of specific statutory authorization.

The rationale for the agency fee is that all persons benefiting from collective bargaining should share a part of the considerable cost of bargaining and handling grievances. Moreover, if a teacher is allowed to enjoy almost all the benefits of union status without having to join or pay dues to the union, teachers will have no incentive to join. As the cost of collective bargaining increases, with a corresponding rise in union dues, more and more teachers may be tempted to accept the fruits of the union's bargaining efforts without joining the union. Without the agency fee, union supporters say that union strength will eventually dissipate, as fewer and fewer members provide financial support for increasingly complex and costly union responsibilities.

Opponents of the agency fee arrangement don't accept this scenario. They argue that if the unions are doing an effective job of representing teachers an adequate number will be voluntary, dues-paying members. Compulsory dues payments for the nonmembers, on the other hand, generate distrust and in the long run may have more detrimental effects on the union than a system of purely voluntary dues payment. Furthermore, because a portion of the agency fee goes to nonbargaining activities such as lobbying and political contributions, nonunion teachers through the payment of the agency fee may be forced to provide financial support for political causes and candidates they oppose.

An experience in Michigan highlights many of the issues regarding agency fees. In 1969 the Detroit Federation of Teachers and the Detroit Board of Education entered into a contract containing a pro-

vision for the payment of agency fees by nonunion teachers. Some four years later the Michigan Supreme Court held that agency fee agreements were illegal because the legislature had not authorized such agreements. The legislature quickly responded by passing a law specifically permitting school boards to enter into agency fee agreements. Beginning in 1973, some 600 nonunion teachers in Detroit refused to pay the agency fee and filed suit against both the union and the school board. The nonunion teachers were allowed to retain their jobs pending the final resolution of the case. The dissident teachers argued that compulsory financial support for the union's activities violated their freedom of speech and association as guaranteed by the First Amendment. Some of the force was taken out of this argument in early 1976 when the Michigan legislature amended the agency fee law by requiring the unions to refund to nonunion teachers any portion of their fees which may have gone for political causes. Nonetheless, the case went all the way to the U.S. Supreme Court, where the nonunion teachers argued that, notwithstanding the refund provision, the agency fee is unconstitutional because all union activity, even bargaining, is political in nature and state-compelled support for such political activity is prohibited by the First Amendment.

In a decision dated May 23, 1977, the Supreme Court held that the First Amendment was not violated by an agreement requiring nonunion teachers to pay a fee to defray union expenses for collective bargaining, contract administration, and grievance procedures. However, a nonunion member cannot be compelled to pay for ideological causes not pertinent to the union's duty as a collective bargaining agent. These types of union activities, such as support of political candidates, must be paid by people who are not forced to do so by the threat that they will lose their teaching jobs. The Court conceded that it is not always easy to draw a line between a union's collective bargaining activities and its ideological causes, but noted that the distinction may become clearer in the future [*Abood* v. *Detroit Board of Education* (1977)].

Duty of Fair Representation

As a condition to the right of exclusive representation, unions have the duty to represent fairly all persons within the bargaining

unit. That is, because a union's status as exclusive bargaining agent severely curtails the individual teacher's ability to represent himself on matters of wages and working conditions, the union is not permitted to favor one group or person over others in the same bargaining unit. This applies to the union's behavior at the bargaining table as well as to its handling of teachers' grievances. Precisely defining the "duty of fair representation," however, is a difficult task. Two recent cases illustrate this point.

The first case again involves the Detroit Federation of Teachers, which agreed to a two-year contract that raised regular teachers' salaries in both years but raised the pay of emergency substitute teachers in the second year only. An emergency substitute filed suit alleging that this disparate treatment constituted a breach of the union's duty of fair representation. A Michigan court upheld the contract. It noted that a union must have broad discretion in considering proposals and in recommending a combination of contract provisions that in its judgment represents the best total agreement. Accordingly, to avoid utter chaos in labor relations and to keep the interventions of the courts to a minimum, a breach of the duty of fair representation is proved only when there is "a showing of bad faith, arbitrary or discriminatory action, or fraud" [*McGrail v. Detroit Federation of Teachers* (1973)].

The Rhode Island Supreme Court reached a somewhat different result in a very interesting and widely discussed case involving a union's duty of fair representation while handling teachers' grievances. In the summer of 1972 the Warwick, Rhode Island, school board posted a vacancy notice for the position of chairman of the high school business department. The vacancy was a "promotional position" that, according to the union/board contract, was to be filled on the basis of qualifications; but if the qualifications of two or more candidates were considered equal, the job would go to the person with the most seniority in the Warwick school system. After reviewing the qualifications of the four applicants for the position, the school board appointed Richard Belanger. An unsuccessful applicant, Arthur Matteson, who had more Warwick seniority than Belanger, filed a grievance with the union. The union pressed Matteson's grievance all the way to binding arbitration, where a panel of three arbitrators held that Matteson should have been selected for the position. After a year as department chairman,

Belanger was demoted to classroom teacher and Matteson assumed the chairmanship.

Belanger then wrote the union, requesting that a grievance be pursued on his behalf. The union refused on the ground that to do so would be inconsistent with its earlier advocacy of Matteson's grievance and with the union/board agreement that binding arbitration would be the final step in grievance proceedings. Belanger filed suit alleging in part that the union breached its duty of fair representation when it agreed to press Matteson's grievance. A lower court agreed with Belanger and ordered him reinstated as department chairman. Matteson and the union appealed.

The Rhode Island Supreme Court found that the union failed to represent fairly all members of the bargaining unit when it agreed to pursue Matteson's grievance without ever contacting Belanger or considering his qualifications for the position. The court termed as "simplistic" the union's defense that Matteson was the only member of the bargaining grieving the selection of Belanger. The court stated: "It should have been apparent to the union that Matteson's grievance, although theoretically against the School Committee, was in reality against Belanger." Because Belanger was also a member of the union's bargaining unit, the union had an obligation to ascertain Belanger's qualifications before determining that the seniority clause should control the selection. The court stated that it would have been sufficient to investigate "in an informal manner . . . so long as its procedure affords the two employees the ability to place all the relevant information before the union." Even though the court could find no evidence of bad faith on the part of the union, it held that the arbitrary refusal to consider Belanger's qualifications before championing Matteson's cause was "a clear breach of the duty of fair representation."

Despite this holding, the Rhode Island Supreme Court refused to reinstate Belanger to the chairmanship. Even though Belanger's right to fair representation was breached by the union's advocacy of Matteson's grievance, the qualifications of both men were fully and fairly considered by the arbitration panel. The school board "forcefully" argued Belanger's suitability for the job, yet the arbitrators ruled for Matteson. This led the court to conclude that even if the union had considered Belanger's qualifications, it still would have elected to press Matteson's grievance and the identical result would

have ensued. Accordingly, Belanger could not demonstrate that he was actually harmed by the union's breach of the duty of fair representation.

Taken together, the Michigan and Rhode Island cases confirm that a duty of fair representation attaches to both bargaining and grievance proceedings. The duty compels neither neutrality by the union in disputes between its members nor equality of results. What is required, however, is a broad consideration of the interests of all members of the bargaining unit. Although states will differ in their application of the duty of fair representation, the principles articulated by the Michigan and Rhode Island courts are likely to be important considerations in any such case.

One final issue will be discussed in this chapter. While the principal focus of this fastback is on teacher bargaining, a few words are in order on the union recognition problem among school board employees who are not teachers.

Noninstructional Personnel

As late as 1965, over 85% of all local teachers organizations included administrators as members. Indeed, this was a venerable bone of contention between the AFT, which traditionally barred administrators from membership, and the NEA, where for decades administrators exercised power far exceeding their proportion of the membership. But the NEA has now sent the administrators packing, and along with the AFT is now completely controlled by teachers. Therefore, for the most part, the "bargaining unit" for teachers organizations is clear: When they bargain with the board, they usually represent teachers and teachers only. But slightly more than 20% of the persons employed by school boards in this country are not teachers.

Noninstructional personnel break down into roughly two categories: school administrators and support staff. First, regarding administrators, it is generally argued that they do not have collective bargaining rights. There are several reasons for this position. One is the direct supervisory function performed by administrators. They are responsible to the board for assuring that teachers arrive on time and discharge all their duties. It is believed that the ability of administrators to carry out these responsibilities would be seriously compromised if they were themselves in a collective bargaining rela-

tionship with the board. Another reason is that the administrators' position in evaluating the teachers' performances, to determine if the instructional standards of the community are being met, might be weakened if administrators did not think of themselves as representatives of management. Also to be considered is the duty of administrators to process the grievances of teachers. As discussed later in this fastback, a teacher's grievance normally involves an allegation that the collective bargaining agreement has been violated by the school administration. These grievances are usually pressed by union officers on behalf of a teacher. The ability of the administrator to resolve the grievance in a management role must be questioned if he is himself a member of or perhaps even an officer of a union. Finally, administrators are expected to fulfill many of the teachers' duties in the event of a teacher strike. They would be required to teach classes, monitor hallways, and even coach sports. Naturally, administrators could not respond this way in a strike situation if, as union members, they were also outside picketing or honoring the picket line.

Nonetheless, many administrators, particularly at the middle-management level (assistant principals, athletic directors, supervisors), reject the notion that their ties with school management are so strong as to preclude their organizing for collective bargaining purposes. They feel they have been isolated between the superintendent's central staff, which exercises all real power in the system, and an increasingly militant and unmanageable teaching faculty. They also point out that the laws in over 20 states permit collective bargaining by school supervisory personnel. These factors have combined to accelerate the growth of unions for school administrators. In July, 1976, the American Federation of School Administrators (AFSA) of the AFL-CIO was created. At its founding AFSA represented some 10,000 members from 52 local unions across the nation. There are reportedly over 1,200 other administrator local unions in the U.S. that are not yet affiliated with AFSA. Over 90% of all administrators local unions are in seven states: Connecticut, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Washington. Some school boards have challenged the union membership of some of their administrators. But it has generally been held that an administrator can join a collective bargaining unit unless he actually bargains for the board, is privy to confidential

information used by the board in bargaining, or makes districtwide policy. Administrators who carry out these functions are distinctly "managerial" and cannot, in the absence of specific statutory authorization, organize for the purpose of bargaining collectively with the board.

Turning now to the support staff or nonprofessional employees of school boards, the principal problem is one of a proliferation of bargaining units. It seems that custodians, bus drivers, food service workers, secretaries, and skilled trades employees all want to bargain separately with the board. This not only diverts the board from issues of educational policy and vastly increases the cost of collective bargaining, but allows the many small unions to "whipsaw" the board into ever higher levels of wages and benefits. The solution in many states is to merge the nonprofessional employees into one collective bargaining unit. Even though the various categories of workers may have different wage scales, they probably all have identical fringe benefits and grievance procedures. The difficult issue of relative wage scales for the various categories of nonprofessional employees can probably best be decided, in the first instance, by the comprehensive nonprofessional bargaining unit when it makes its proposals to the board. Certainly the board can modify the wage proposals, but at least the contract proposals serve as a legitimate basis for deciding relative wage levels for the different categories of workers. Some states might exclude clerical employees from the comprehensive nonprofessional bargaining unit. Florida and Iowa, for example, have held that secretaries are "white-collar" workers and do not share the collective bargaining objectives of other support staff.

In concluding this chapter on union recognition and certification, it can be observed that while the concept of the exclusive bargaining representative has its problems, it appears to be superior to any other method yet devised for bringing form and structure to the collective bargaining process. Although the term "exclusive bargaining representative" suggests a closed system, it actually contains several safeguards to prevent abuse. One is the recognition or certification procedure that usually allows for a representation election whenever sufficient dissatisfaction builds up against the exclusive bargaining representative. Another safeguard is the practice, required by law in most states, of requiring that

contracts be ratified by a majority of the faculty before taking effect. In short, even though the exclusive bargaining representative may have the privilege of sitting at the bargaining table without interference from rival teachers organizations, it still must perform in accordance with the wishes of its whole constituency. If not, it may suffer the embarrassment of having the agreements it hammered out with the school board rejected by the teachers or, worse yet, it may lose its status as exclusive bargaining representative at the next election.

Scope of Bargaining

Once the exclusive bargaining representative has been selected, the union and the board are ready to begin bargaining. What do they bargain about? Potentially, the number of topics about which teachers would like to bargain is almost limitless: salaries, tenure, school calendar, curriculum, student discipline, sick leave, promotion policy, sabbaticals, clerical assistance, dues checkoff—to mention a handful. But defining topics that school boards may or must bargain with teachers is a complex matter. It has occupied more legislative and judicial attention than any other issue in educational collective bargaining, with the possible exception of teacher strikes. In order to determine the scope of bargaining in any school district, one must first refer to the pertinent state statute. Although generalizations on this subject are very precarious, due to the diverse and rapidly changing nature of state collective bargaining laws for teachers, some broad descriptions are possible.

A number of states have developed broad guidelines and allow the school boards, teachers unions, and courts to hammer out concrete definitions of bargainable topics. Typical of state laws in this category are those that allow or require boards and unions to bargain on "wages, hours, and other conditions of employment." Other laws in this category permit bargaining on matters affecting the performance of professional services (Oklahoma) and on items of direct or indirect monetary benefit to employees (Oregon). Laws of this nature may be either permissive or mandatory. That is, some laws *permit* the board and the teachers to bargain within the broad guidelines, provided the parties mutually agree to bargain on the topics. Others *require* the board to bargain with the teachers on subjects falling within the guidelines. In states within this latter category, if the board refuses to bargain on a topic that the teachers

union believes is mandatory, the union can file an unfair labor practice with the PERB or request an injunction from the courts. For example, several years ago in a state with a law requiring school boards to bargain wages, hours, and conditions of employment, a local school board took the position that the school calendar was outside the mandatory bargaining topics. The teachers sued and won an injunction requiring the school board to bargain with them on the calendar.

Some states have rejected the broad guidelines approach and instead delineate bargainable topics in specific terms. Again, the items on the list may be either permissive or mandatory subjects of bargaining. Further variations occur in states, such as Nevada, that limit collective bargaining to only those topics delineated in the laws, and states which list certain mandatory topics but allow bargaining on other topics by mutual consent of the parties. Another scheme, possibly in combination with one of the approaches discussed above, is to prohibit bargaining on certain specific topics. Minnesota, for example, bans bargaining on "educational policy," while Hawaii has a more extensive list of prohibited topics. Although I don't know of a specific example, it would be possible for a state to construct a collective bargaining law that requires school boards to bargain on certain topics, prohibits bargaining on specified topics, and permits bargaining on any other topic with the mutual consent of the parties.

In short, great diversity marks the approaches taken by the states to define the scope of bargaining. This is one of the major complaints of those advocating a federal law governing collective bargaining for public employees.

A brief case study dramatizes the confusion spawned by the present patchwork of state collective bargaining laws. Teachers in a number of states have been seeking to include in their contracts provisions regulating student discipline. A number of factors are responsible for this effort: increasing fears about personal attacks on teachers, apprehension about expanding concepts of student rights, and a desire to improve instruction by removing the disruptive student from the classroom. The proposals some teachers unions are seeking to bargain into their contracts permit the teacher to refer a disruptive student to the principal and to bar the student's readmission to class until a conference is held with the teacher present.

Other proposals allow teachers to remove a student from the classroom permanently after two violations of the disciplinary code. For the most part, school boards have been willing to bargain with teachers on these proposals. But in those few cases where boards have refused to bargain on student discipline, state PERBs (usually required to resolve scope of bargaining issues before court action can be taken) have reached conflicting decisions. In Nevada and Wisconsin it was decided that matters of student discipline were intimately related to teachers' working conditions and were therefore mandatory bargaining issues. Oregon and Iowa, on the other hand, held that student discipline was a matter of managerial prerogative reserved to the school board. This is not to suggest that any of the four decisions were biased or lacking in principle; each turned on the particular language of its state's collective bargaining law. It is only to demonstrate that a matter of universal concern to teachers, such as student discipline, has not been universally considered a collective bargaining topic.

Occasionally a school board will promulgate a policy only to find out later that the policy concerned a topic that should have been bargained with the teachers. This happened in yet another case involving the Detroit Board of Education, which adopted a policy requiring that all teachers hired or promoted must be residents of the city of Detroit. The Detroit Federation of Teachers challenged the residency requirement on the grounds that since it affected a "condition of employment" it was a mandatory subject of bargaining and could not be unilaterally adopted by the board. The Michigan Court of Appeals partially agreed and struck down the residency requirement as it applied to promotions, but not as it applied to initial hirings, because applicants for teaching jobs were not employees of the board and were not members of the bargaining unit [*Detroit Federation of Teachers* v. *Board of Education* (1975)]. In a Massachusetts case the board signed a contract containing a "sick leave bank" (each teacher donates two days of sick leave to the "bank," upon which teachers with prolonged illnesses can draw when their personal sick leave is exhausted), but later refused to honor the provision on advice of counsel. The Massachusetts Supreme Court held that the "sick leave bank" provision was properly negotiated with the teachers and must be honored by the board [*Allen* v. *Town of Sterling* (1975)].

One should not get the impression, however, that all matters touching on teacher employment can or should be bargained with teachers. In construing collective bargaining laws, the courts have recognized a number of restrictions on the power of boards and unions to bargain topics arguably within the ambit of teacher employment. First, it is self-evident that bargaining cannot lead to contract provisions which violate constitutional principles. This was at issue in another Michigan case where the teachers union agreed to a contract requiring women teachers to take leave without pay for four months following childbirth. This was contrary to a U.S. Supreme Court decision [*Cleveland Board of Education* v. *La Fleur* (1974)] which ruled that delayed reemployment provisions were unconstitutional unless they were linked to the actual incapacity of the teacher. Accordingly, a teacher whose baby was born in July and who wished to resume teaching at the beginning of the school year in September sued the board. The Michigan Court of Appeals declared the contract provision invalid as a violation of public policy. This type of constitutional violation is also possible in the area of student discipline mentioned above. In formulating contract provisions governing the power of teachers to eliminate disruptive students from their classes, negotiators must be careful not to violate the constitutional rights of students as articulated by the Supreme Court [*Goss* v. *Lopez* (1975)].

A second restriction on collective bargaining concerns matters that are already clearly determined by state law. For example, an Illinois court recently held that, where the state legislature has carefully defined the rights of tenured and nontenured teachers, a contract provision that gave nontenured teachers more employment security than the state statute was unenforceable [*Wesclin Education Association* v. *Board of Education* (1975)]. Similarly, a Pennsylvania court struck down a contract provision that granted full pay to teachers on sabbatical leave. The court found this was inconsistent with a state law providing for half pay to teachers on sabbaticals [*Allegheny School District* v. *Allegheny Education Association* (1976)].

Third, accrued contractual rights possessed by some teachers cannot be bargained away. This was pointed out by a Delaware court when a school board paid two-thirds of several teachers' moving expenses but refused to pay the final installment because the new

collective bargaining agreement contained no provision for payment of moving expenses. The affected teachers sued for the final installment and won on the grounds that, during bargaining, the parties determine future contract provisions but have no authority to abrogate vested contractual rights.

Finally, as already mentioned in connection with student discipline, school boards in some states are not obligated to bargain on topics that can be said to be within the exclusive prerogative of management. A recent example occurred in Massachusetts, where a local school board unilaterally abolished the position of supervisor of music. The union challenged the action on the grounds that it should have been bargained with the teachers. The court upheld the board's decision, noting that the continued existence of supervisory positions is a matter of educational policy exclusively within the management prerogative of the board [*School Committee of Hanover* v. *Curry* (1975)]. Even though courts have occasionally recognized school boards' management prerogative in cases involving collective bargaining disputes, caution should be exercised before placing exclusive reliance on it in a legal showdown. It is extremely difficult to define precisely what falls within the purview of management prerogative. Moreover, management prerogative will vary considerably from state to state, and it will have no force whatsoever in a situation where state law mandates bargaining on a particular topic, thereby removing the topic from exclusive management prerogative.

To summarize, scope of bargaining is an important component of the study of collective bargaining because it determines the subjects that the board and the teachers will actually negotiate. Teachers could win many rights from the legislature, such as the right to certification as exclusive bargaining agent, the right to strike, or the right to dues checkoff; but if the scope of bargaining is extremely narrow or is not mandatory for the school board, collective bargaining would be an empty promise, little more than an exercise in organizational busy-work. Thus teachers have focused considerable attention on expanding and defining the scope of bargaining and on making bargaining mandatory on most topics. Because scope of bargaining is a matter governed by state law, the result is a crazy quilt pattern when viewed from a national perspective. For example, one state might require bargaining on a topic while a neighboring state

might prohibit bargaining on the same topic. Only a state-by-state analysis of collective bargaining laws would do justice to the great diversity of approaches to the scope of bargaining problem. Yet, as pointed out above, despite the importance of these laws to the collective bargaining process, unions and school boards cannot use the authority given them by state law to override constitutional and statutory principles or the vested contractual rights of persons in the bargaining unit.

The Bargaining Process

The actual give and take which goes on at the bargaining table is a mystery to most people. How does it begin? Who does the talking? Why is progress sometimes so slow for so long and then suddenly agreement is reached? There are no pat answers to these and a myriad of other questions often asked about bargaining. The answers will depend upon the specific factors in the particular bargaining situation. Thus perhaps the most informative way of approaching the bargaining process is to identify the key variables that highlight collective bargaining in education. How experienced at bargaining is the teachers union? The board? Is the board fiscally dependent or independent? Does the board itself bargain, or does it have a representative? What is the superintendent's role? What is the public's attitude? Are the teachers united and militant, or disorganized and complacent? Are the board members politically secure? This is not an exhaustive list, but it suggests the factors that must be considered in analyzing a particular set of negotiations.

The cast of characters in the bargaining process should also be identified. By this time, of course, the teachers have selected an organization to act as their exclusive bargaining agent. This organization will generally be affiliated with the NEA, the AFT, or a merged state affiliate. In some rare instances the agent will be unaffiliated with any state or national organization. The customary practice is to select a bargaining team from the faculty. The spokesperson for the team is either a bargaining specialist from the state teachers organization or an officer from the local organization. On the other side, representing the board, may be the whole board, a part of the board, one member of the board, or more frequently a professional negotiator, who is often an attorney. The board's representative may be assisted by various school administrators, such as the business

manager or the assistant superintendent for instruction, depending on the topic being discussed. For the most part, however, each side will have just one spokesperson.

Preliminary Bargaining

As the format of this fastback suggests, the bargaining process actually begins long before the parties ever sit down at the table. During any election campaign to select the organization that will represent the faculty at the bargaining table, many promises are made and many expectations are created. These themes may be developed and crystallized as the bargaining begins. Moreover, the whole political milieu that defines the scope of bargaining in the state must be viewed as an essential precursor to actions at the bargaining table. But the focus in this section is on the face-to-face aspects of bargaining, the interaction between board and union over the contents of the teachers' contract.

The actual bargaining usually begins with the development of contract proposals by the teachers' bargaining team. These proposals are derived from a number of sources: contracts in other cities, suggestions from teachers, and refinements of the last contract. The bargaining team may have vivid memories of the difficulties it had in persuading the faculty to ratify the last contract and may want to avoid such episodes in the future by satisfying the more vocal elements of the bargaining unit. In any case, a proposed contract is presented to the school board. The scope and nature of these proposals may astound the board. When he received contract proposals for the first time, one board member in a Midwestern city was heard to utter, "What is this, 'Gone with the Wind'?" Of course these proposals are filled with provisions that the teachers will not insist upon in the final contract. Such items are termed "throw-aways" or "horse-trading material." Nonetheless, in the preliminary stages of bargaining the teachers' bargaining team will display much theatrical anguish as the throwaways are sacrificed in exchange for some concession by the board. Recognizing the real throwaways in any package of proposals is not always simple. What at first may appear to be a frivilous proposal may turn out to be a rock-hard demand supported by an important element of the teachers union. Recognizing throwaways, therefore, requires an ability to view each proposal in the context of the entire package of proposals, as well as

some accurate information on the mandate given the bargaining team by the faculty.

Typically, the proposals advanced by the teachers are followed by counterproposals developed by the board. The board's counterproposals will bear as little resemblance to the final contract as did the teachers' proposals. Why then go through the ritual of proposals and counterproposals? For some of the same reasons that basketball games have first halves and books have introductory chapters. The preliminary proposals and counterproposals set the tone for future bargaining, acquaint the bargainers with each other, and establish patterns of communication that may prevail throughout the bargaining.

Sometimes teachers will prepare a written response to the board's counterproposals. This may be in the form of rebuttal to the board's positions or may be in the form of counter-counterproposals. The board, in turn, may respond to this. More than likely, however, after proposals and counterproposals have been exchanged, the parties will cease the exchange of paper and begin the discussions.

In many districts, both the teachers union and the board will advance contract proposals at the outset. This tends to expedite the initial stages of bargaining, because the teachers don't have to await the board's counterproposals to ascertain the board's preliminary position on some key issues. When this procedure is followed, both sides will prepare counterproposals and the bargaining proceeds from there.

At first, particularly if the present contract still has some time to run before expiration, the actual bargaining sessions may be infrequent, perhaps a week or more apart. These preliminary sessions are almost always on nonsalary items. When a stalemate arises on a matter, the bargainers will probably move on to an issue where some common ground can be found. As the weeks drag on, the number of issues in strong dispute will narrow. If the bargainers are experienced and perceptive, they will eventually identify the other side's priorities. This facilitates agreement on other matters until only the most critical issues remain.

Bargaining Strategies

This fastback is not intended to be a primer on negotiating tactics.

However, for the interest of the reader who may only observe bargaining from the outside, several traditional principles of successful negotiating may be of interest.

Bargainers can expect better results if they enter negotiations with a clear picture of their overall strategy. They should categorize their primary objectives, their secondary objectives, and their throwaways. They should identify for themselves the parameters of their authority. In the case of the teachers' bargaining team, what is the absolute minimum it can bring back to the faculty and still hope for ratification? In the case of the board's bargainer, what are the maximum concessions that can be granted? This type of preparation not only avoids ad hoc decisions the bargainer will later regret but also speeds bargaining, because with major objectives clearly in mind the parties have enough confidence to make minor concessions.

Another often-stated principle of negotiating is that a bargaining team should speak with just one voice. Communication at the bargaining table is a delicate enough process without having several spokespersons on each side confusing the picture. In the early days of collective bargaining in the schools, the board members themselves would often appear at the bargaining sessions and speak out freely on the topics under discussion. This would allow a skillful bargainer for the teachers to detect and exploit disagreements among the board members. Since school boards usually decided matters by consensus, it was believed that the board's position on any given issue would be no stronger than the views of the weakest member. Thus if the teachers were successful in converting one sympathetic board member to their side on an issue, they could reasonably expect cooperation from the entire board. Working this way on issue after issue, the teachers might win important concessions throughout the contract. For this reason and because of the tremendous time demands of bargaining today, school boards rarely take this approach to bargaining any longer. Likewise, on the teachers' side, if many voices are speaking, weaknesses and uncertainties will be revealed. These in turn can be manipulated by an experienced board negotiator who will carefully note issues upon which there is teacher dissension. In short, if either side allows more than one person to speak at the table, it is inviting trouble.

Among the most important rules of successful collective

bargaining is never to state your "bottom line" until you absolutely have to, usually to reach final agreement. For example, say the teachers have proposed an 8% salary raise and the board a 2% raise. After a few preliminary skirmishes on this issue, in which the teachers refuse to budge, a board member blurts out, "Look, we've already decided that 5% is all you're going to get, so you can forget about 8!" This outburst has two immediate consequences, both negative for the board. First, the teachers gained three percentage points without giving up a thing. Second, the board's bargaining position now *begins* at 5%, not the proposed 2%. The teachers now will absolutely not settle for anything less than 5%, and they're going to do their best to get more. The moral of the story is simple: There is a time and place to make major concessions. Any premature disclosure of bottom-line positions is the equivalent of a major concession and only makes agreement at the end that much more difficult.

A final principle—difficult to articulate and even more difficult to apply—requires that a bargainer always give his adversary something that can be construed as a victory. This allows the adversary to return to his clientele (either the faculty or the school board) with a contract that he can persuasively urge them to ratify. It doesn't really matter if your concessions are real or superficial; the important thing is for the other side to *believe* that you are yielding important ground. A skilled negotiator might accomplish this by vehemently insisting throughout the negotiations on a particular contract provision that he knows is not essential to his side. He must persuade his adversary across the table that this provision is a priority item. Once this has been accomplished, the point can be conceded in the final stages of bargaining and the other side may believe it has scored an important victory. This is not as easy to accomplish as it might seem. In order to have something to give up at the end, a bargainer must be sure he doesn't get his back to the wall early in the negotiations. He must avoid the temptation to relinquish all nonessential positions early in the game in order to win minor concessions from the other side. If he yields to that temptation, he will have no concessions left except ones that cut to the heart of his bargaining objectives.

Agreement or Impasse

The persons actually bargaining a contract don't have the final

word. In most situations the contract must be ratified by both the faculty and the school board. Ideally, the bargaining teams will reach agreement on a contract that each team can recommend to its clientele. In turn, it is hoped that both the faculty and the school board will accept the recommendations of their respective bargaining teams and ratify the contract.

Unfortunately, however, a number of other scenarios can unfold. Frequently, the school board will make a final offer that is unacceptable to the teachers' bargaining team. The bargaining team will then make a recommendation to the faculty against ratifying the contract. If the faculty concurs, the bargaining team may attempt to schedule further negotiating sessions or may resort to the various mechanisms of impasse resolution that may be available in the state. (See following chapter.) Occasionally either the faculty or the school board will balk at the recommendations of its bargaining team. Moreover, it is not unheard of for a teachers' bargaining team to be split, some members favoring and some opposing contract ratification. These views may be openly expressed before the faculty, or the bargaining team may decide to suppress individual views and simply present no recommendation whatsoever regarding the proposed contract. In the latter instance, the bargaining team will explain the provisions of the proposed contract to the faculty but will decline to make a specific recommendation.

Why do some bargaining situations end in agreement and others in deadlock? Again, generalizing is difficult because of varying circumstances in each school district. Failure to observe some of the bargaining strategies mentioned above may contribute to impasse. Beyond this, a few theories on the reasons for negotiation failures can be offered. One of these theories holds that teachers are occasionally the unwary victims of unreasonable expectations. These expectations are created through a number of factors: large raises secured in neighboring but wealthier districts, the rhetoric of union organizers, and perceived advances resulting from militancy in the trade unions. Teachers end up demanding more from the bargaining process than reasonably can be expected, given the financial resources of their school district. The result is that they reject contract proposals which, although reasonable, do not measure up to their inflated expectations.

Another theory accounting for negotiation impasse is that

teachers often fail to recognize and counteract the widespread public belief that teaching is a soft job. The public sees teachers leaving the schools at 3:00 p.m. in some cities, sees them enjoying more vacations during the school year than the average person has all year, and on top of that sees them free of all duties for nearly three months of the year. This public perception of the teacher's life often is transmitted to and shared by school board members, who use it to reinforce the fiscal constraints they already feel. Naturally, school board members are reluctant to grant huge raises and more freedom to teachers while the public is seriously questioning what teachers do to deserve their current standard of living. Such attitudes can lead to stalemate at the bargaining table. To avoid this, some observers believe that teachers must begin to change public perceptions about the job of teaching. This won't be easy, because it involves convincing people of the teacher's need for a physical and mental recharging during school vacations, of the voluminous homework many teachers do every evening, and of the continuing education requirements in most teaching jobs. If the public were to become more widely aware of the true nature of the teacher's job, perhaps agreement would flow a little more easily from the bargaining table.

It would be a mistake to leave the impression that teachers are always to blame for a breakdown in bargaining. On the contrary, one theory on this problem has it that some school board members and top-level administrators are simply arbitrary and perhaps capricious when bargaining with teachers. They feel that the whole union movement among teachers is a threat to their managerial prerogatives. Accordingly, they view bargaining as a contest that must be won irrespective of what impact the "victory" may have on the schools. Board members and school administrators differ in an important respect from their management counterparts in private industry: Their livelihood is not affected by a bargaining impasse. A strike in private industry has the potential of reducing management's profits. This fact provides a powerful incentive to reach agreement at the bargaining table. No such incentive exists with respect to management in the schools. Thus a school board member, if he is so inclined, can act out personal and psychological animosities against the teachers during bargaining and has no fear of personal financial reprisals. In fact, the full force of government will often back his behavior by discharging, fining, and even jailing teachers who dare

strike rather than accept what may be the irrational dictates of such a board member. I don't have the data to determine whether the lack of personal financial accountability has lead to more bargaining impasses in the public sector than in the private sector. Suffice it to say that the opportunity for abuse exists and is sometimes exercised.

The Impact of Open Meeting and Open Records Laws

Bargaining over teachers' contracts has traditionally been done in sessions closed to the public. Indeed, not only are members of the public as well as most teachers and administrators excluded from the bargaining sessions, but the bargaining teams often pledge not to discuss the negotiations with anyone, particularly the press. It is believed that the circulation of rumors about the bargaining sessions will only lead to confusion on the part of the faculty and the public and make the job of the bargainers more difficult. The same reasoning has been applied to the written documents—proposals and counterproposals—exchanged between the parties at the bargaining table.

These assumptions about the need for secrecy during bargaining have been under attack in recent years. Many states have passed open meeting or "sunshine" laws requiring that, except in certain specified situations, all meetings of public bodies must be open to the public. Many states have also enacted open records or "freedom of information" laws requiring that the public be given access to most public documents. Because both the public employers and the public employees unions have opposed the inclusion of collective bargaining in the open meeting and open records laws, it has been specifically excluded by most states. A few states, however, have resisted these lobbying pressures and have included collective bargaining to some degree in the open meeting and open records laws. California, for example, requires that the initial proposals of both parties must be made public. Bargaining cannot begin "until a reasonable time has elapsed" and a hearing has been held. All new proposals must be made public within 24 hours of their presentation at the bargaining table. In Wisconsin disclosure is required after the teachers have ratified a negotiated contract but before the school board meets to consider adopting the contract.

Florida has probably exceeded all other states in the extent to which it opens collective bargaining to the public. On January 1,

1975, a law which has been interpreted to require that collective bargaining sessions be open to the public went into effect in that state. Reviews of the experience have been mixed. The opinions of those who always opposed public access to the bargaining process have probably been reinforced by the Florida experience. It has been reported, for example, that the media have distorted and confused the positions of the parties and that negotiators devote more time and energy posturing for the press and the public than negotiating in good faith. On the other hand, many in Florida have reported that the open meeting experience has failed to bear out the fears of those who wanted to keep the bargaining process secret. Moreover, they argue, while the disadvantages of thrusting negotiations into the sunshine have been slight, the law has achieved many of its objectives. The public is more deeply involved, the teachers know what is going on at the bargaining table, and the bargainers are forced to be more accountable for their actions throughout the bargaining process, not just at the end. This is not to suggest that sunshine laws are the answer to all the defects of collective bargaining in the schools. The jury is still out on the Florida experience. But the initial reaction suggests that those who oppose public access to bargaining sessions may now have the heavy burden of demonstrating why sunshine laws should not open up the bargaining process in other states.

Methods of Impasse Resolutions

What happens when parties cannot reach agreement at the bargaining table? In some states teachers must either accept the last offer of the school board or engage in an illegal work stoppage. In other states the legislatures have set up one or more methods for resolving bargaining impasses without a work stoppage. Although details may vary, these methods fall into three general categories: mediation, fact-finding, and arbitration. Each of these will be discussed below. In addition, because teacher strikes are a frequent, albeit usually illegal, method of expediting the resolution of bargaining impasses, work stoppages will also be discussed below.

Mediation

Some state laws provide that teachers and school boards deadlocked at the bargaining table can avail themselves of the services of a labor mediator, who is usually an employee of or selected by the state PERB. The mediator confers with the parties, either together or separately, and reviews relevant documentary evidence. He* attempts to narrow the issues and foster communication between the parties. By draining the emotionalism from the positions of both sides, he may be able to promote a better understanding between the parties. He may issue specific recommendations to the parties for the resolution of the impasse. These recommendations are usually not made public and are not binding on the parties. If the parties are satisfied as to the fairness of the mediator and have fully

*For clarity and economy, we use the masculine form of pronouns throughout this fastback when no specific gender is implied. While we recognize the trend away from this practice, we see no graceful alternative. We hope the reader will impute no sexist motives; certainly no sexism is intended. —*The Editors*

aired their positions before him, they might voluntarily accept his recommendations. But if either side decides to reject the suggestions of the mediator for any reason, it is free to do so. Therein lies the chief complaint about mediation: If the parties are truly intransigent, mediation is just wasted motion. Yet there are those who continue to believe that the mediator can provide a valuable service and reduce the frequency and length of work stoppages merely by fostering communication between the parties.

Fact-Finding

Instead of and sometimes in addition to mediation, states will provide the services of a fact-finder to teachers and school boards locked in a bargaining impasse. The techniques of fact-finding are not dramatically different from those of the mediator. Both sides will present their positions to the fact-finder, who will then issue his nonbinding recommendations or "award." The critical difference here is that the fact-finder's recommendations are usually made public. This can direct pressures against a party taking an unreasonable and recalcitrant position. The public nature of the fact-finder's recommendations also frequently provide an "out" for a union official or school board chairman who privately hopes for a compromise settlement but publicly must take a hard-line position.

Commentators have cited a number of problems with fact-finding. To some degree these criticisms apply to mediation as well. One problem is the lack of pertinent criteria upon which a fact-finder can base his recommendations. For example, is a fact-finder allowed to examine the impact of his recommendations on the tax rate? What constitutes an unacceptable increase in the tax rate? What if tax rates are fixed by law? Related to this is the argument that, because the fact-finder's recommendations are not binding on the parties, he feels no sense of accountability regarding the educational or fiscal consequences of his recommendations. Another problem is the widespread perception among teachers unions that they will gain more by seeing their disputes go through fact-finding than by settling at the bargaining table. This perception not only discourages good faith bargaining but clogs the fact-finding machinery. Despite these and other criticisms of the fact-finding procedure, it is still generally viewed as a constructive mechanism to assist the parties in reaching voluntary settlement.

Arbitration

Arbitration differs from mediation and fact-finding in that the parties normally agree to be bound by the award of the arbitrator. A number of states have adopted binding arbitration as a means of reducing or even eliminating strikes by policemen and firemen. Inasmuch as arbitration has the effect of removing the final decision from the public agency and placing it in the hands of an arbitrator, there is resistance to adopting the practice in any occupational group except those affecting public safety. Nonetheless, several states have enacted compulsory arbitration statutes applicable to teachers. Thus when collective bargaining between the teachers and the school board reaches an impasse, the parties are required to submit the dispute to an arbitrator. There are some who suggest that such statutes involve relinquishing the managerial authority of the school boards. This may well be true, but in most states the authority held by school boards is not inherent but is delegated by the legislature. Thus the legislature is free to alter or reduce school board powers, including the power to have the ultimate decision on collective bargaining agreements.

A complaint frequently heard about compulsory arbitration in the public sector is that arbitrators simply split the difference between the parties' final proposals. Any other outcome would be viewed as grossly unfair by one of the parties and the resulting uproar would probably guarantee that that particular arbitrator will not be used again. Because arbitrators want to work (many are law professors who serve as arbitrators on a part-time basis), and because either side in a labor impasse can normally veto the selection of a particular arbitrator, arbitrators are not anxious to be branded as pro-labor or pro-management. The best way to avoid such characterizations is to cut the pie right down the middle. Neither side will be thrilled by the result, but more importantly, from the point of view of the arbitrator, neither side can accuse him of pronounced bias. This is not to say that arbitrators don't occasionally strike out on a bold path. There is one reported instance, at least, wherein an arbitrator granted teachers a larger pay increase than they were requesting. But such instances are rare.

The "split the difference" mentality displayed by many arbitrators is anathema to school boards. They say it robs them of the ability to run a fiscally sound school district, eliminates the incentive for

teachers to bargain in good faith, and places all the pressure on the board to make concessions. While the fear of arbitration may reduce some egregious intransigence on the part of school boards, it may also discourage boards from making a final, good faith proposal to settle the impasse before it goes to arbitration. If the teachers reject the board's proposal, that final offer could become the starting point for the arbitrator's "split the difference" award. Thus by making a good faith final offer the board will be penalized because the teachers may receive an award that is a percentage point or two higher than they would have received if the board had stuck to its previous offer. The same line of reasoning could discourage the teachers from lowering their demands in order to reach a settlement without going to arbitration. In short, the very existence of arbitration and the "split the difference" mentality of arbitrators may actually deter voluntary resolution of bargaining deadlocks.

These defects in compulsory arbitration have prompted the creation of a mechanism known as "final-offer arbitration." Rather than having free rein to devise any award that suits his sense of equity, the arbitrator is required to choose either labor's final offer or management's final offer. Contrary to conventional arbitration, this approach places tremendous pressure on both sides to make a reasonable final offer. In formulating these final offers to enhance acceptance by the arbitrator, the parties may realize they are close enough to resolve the matter on a voluntary basis. Moreover, while school boards may assert that this approach still strips them of the final decision, they cannot dispute that final-offer arbitration removes the arbitrator's discretion to take the path of least resistance and split the difference between the parties' final offers. Thus if the board presents a reasonable final offer, one it can convincingly support, the board can hope that its position will be adopted. While school boards may complain that any form of binding arbitration is legal blackmail, they should find final-offer arbitration less objectionable than conventional arbitration, because it not only provides an inducement for voluntary settlement but it eliminates the arbitrator's ability to play it safe.

There are two types of final-offer arbitration. One allows the arbitrator to select either party's final offer on each item in dispute. That is, if five items are in dispute, the abritrator could hypothetically pick the teachers' final offer on two items and the board's final

offer on three. The drawback of "item-by-item" final-offer arbitration is that it permits a type of "split the difference" approach. Rather than equivocating on each item, the arbitrator merely divides up his favorable decisions in such a way that each side gets about equal treatment. This may not always be easy, however, because with regard to what is probably the critical item in dispute—salaries—the final offer arbitrator is not permitted to play it safe; he must pick either the teachers' or the board's final salary proposal. Salaries play such a central role in bargaining that an arbitrator may not be able to "even it up" even if he decides for one side on salaries and for the other side on all other items in dispute.

The other type of final-offer arbitration requires the arbitrator to select one party's total package of final offers. No matter how many items are in dispute, the arbitrator must select all of one side's final proposals or all of the other side's final proposals. This eliminates any chance that the arbitrator will attempt to keep everyone happy.

Preliminary experience with final-offer arbitration has been positive, although very little of it has occurred in the education area. More experience is necessary to determine whether it provides as many advantages to teacher collective bargaining as its supporters assert.

Work Stoppages

One of the first teacher strikes in the country took place in 1960, and during the next four years there were only 10 more. Most of these early strikes lasted only a day before some compromise was reached. The frequency of teacher strikes increased dramatically, and in 1968-69 there were 131 stoppages, each lasting an average of more than 21 days. Since 1968-69, although the number of teacher strikes per year has been near to or greater than 100, the average length of strikes has moderated, rarely exceeding 10 days in any year. Perhaps it can be argued that with 16,000 school districts in the country, a few hundred strikes do not constitute a major concern. On the other hand, the school systems experiencing strikes most often tend to be those in large cities already beset by a wide range of fiscal and administrative problems. A teacher work stoppage in a large city can have significant economic and political consequences completely apart from the scope of the contract that is ultimately signed. In short, all statistics aside, a teacher strike is a significant

event in the public affairs of any municipality, and the subject deserves the careful consideration it usually gets in a discussion of labor relations in the schools.

As a device for resolving bargaining impasses, the strike is usually an act of last resort. It expresses failure to achieve settlement through the conventional channels of impasse resolution. If fact-finding, mediation, and arbitration are not available to the teachers, they may be faced with a choice between the board's final offer and a strike. It was precisely to avoid this dilemma that many states established the impasse resolution methods discussed above. Strikes nonetheless continue to occur, even in those states that have compulsory arbitration. Some people conclude that these strikes are proof of flaws in the impasse resolution machinery. While research is not conclusive, preliminary findings suggest that fact-finding, mediation, and arbitration do reduce the number of teacher strikes. Thus, although it is true that a strike means that the parties were unable to settle within the established impasse resolution channels, it does not always follow that such channels are of no value.

Teacher strikes are illegal in most states. It is clear that public employees have no constitutional right to strike. In order to have a legal strike, therefore, the legislature has to grant that right by statute. Most states, however, have expressly forbidden public employees, including teachers, from striking. A few states allow some public employees to strike but only after certain conditions are met. Teachers, along with policemen and firemen, are sometimes excluded from these right-to-strike laws on the grounds that a strike by them would threaten public safety. Nonetheless, some states have legalized strikes by teachers, and some commentators have discerned a movement in this direction by other states.

When teachers illegally strike, there are a number of sanctions that can be applied to them. A school board faced with an illegal strike will often obtain a court injunction against it. If the teachers disobey the injunction, then the court can impose a variety of penalties. The union leaders can be fined and even jailed until they order the teachers back to work. A Massachusetts judge recently enjoined a teacher strike, and when the injunction was ignored he fined the union leaders $300 a day and forbade the union from paying the fine for the leaders. The judge also fined each striking teacher and levied a daily fine on the union. Thousands of dollars in

fines were incurred by the teachers before the strike finally ended. In another recent case, in Wisconsin, the state supreme court lifted a daily fine imposed by a lower court on certain striking teachers who did not have advance personal notification of the fine [*Joint School District* v. *Wisconsin Rapids Education Association* (1975)]. In a related Wisconsin case, the state supreme court held that a state law that limits fines against striking public employees to $10 a day does not preclude a separate fine against the union. However, the fine against the union must be limited to a total of $250 unless the lower court specifically found that a larger fine was necessary to enforce its injunction [*Kenosha Unified School District* v. *Kenosha Education Association* (1975)]. Before we leave the subject of court injunction, it should be noted that the school board isn't the only party that can seek an injunction. In Florida, when a school board being struck by teachers didn't seek an injunction, the state PERB went into court and obtained one. The teachers challenged the PERB's authority to do this, and the state court of appeals found that the PERB had acted within the scope of its authority. To find otherwise, according to the court, would allow a school board, by failing to act, to nullify the state's law against teacher strikes [*Broward County Classroom Teachers Association* v. *Public Employee Relations Commission* (1976)].

In addition to fines and jailings, teachers engaged in illegal strikes risk being fired. School boards in large cities are reluctant to take this tack, because of the obvious difficulty in replacing a faculty numbering in the thousands. Mass firings, however, have been carried out in some smaller school districts. In fact, a recent U.S. Supreme Court decision dealt with this very issue. Striking teachers in Hortonville, Wisconsin, were notified by mail of their discharge, but were virtually promised their jobs back if they reapplied. One teacher returned to work, but over 80 remained on strike. The teachers challenged the firings in court on the grounds that the board lacked sufficient impartiality, because of its involvement in protracted negotiations with the teachers union, to discipline the striking teachers. The teachers based their argument on a 1972 U.S. Supreme Court decision holding that a former prisoner's parole could be revoked only after he was given an initial hearing before someone not involved in his case. The Supreme Court rejected the teachers' argument. It held that unless the teachers could show that

the school board was motivated by financial impropriety or personal animosity the board could not be disqualified by federal courts from its statutory responsibility to appoint and discharge teachers [*Hortonville Joint School District* v. *Hortonville Education Association* (1976)].

In concluding this chapter on impasse resolution, I must note that a bargaining deadlock is always possible whenever two parties enter into negotiations. The methods that have been devised in some states to deal with impasses—fact-finding, mediation, and arbitration—are not perfect, in the sense that they don't resolve every dispute and strikes still result. But no one ever claimed that these methods could resolve every dispute. The proper response to this state of affairs is not to throw one's hands in the air and proclaim the futility of impasse resolution. For those who believe that strikes usually benefit no one, including the teachers, the proper response is to seek refinement of the methods for the orderly settlement of collective bargaining disputes.

Grievance Procedures

In a narrow sense, collective bargaining ends when the contract is ratified by both the faculty and the school board. But a complete discussion of collective bargaining should include some reference to mechanisms established for teachers to enforce the provisions of the contract after it has been ratified. Theoretically, of course, there should be no need for such mechanisms, because the courts of every state are empowered to remedy breaches of contract. But because of the cost and delay of litigation, alternative methods for the adjudication of alleged contract violations have been developed. These alternative methods, usually called grievance procedures, are intended to be quicker, simpler, and much less costly than private litigation. Often grievance procedures are incorporated in the teacher/board contract, sometimes in great detail.

Grievance procedures normally involve a series of steps. First there may be a requirement that the teacher bring the grievance to the attention of a supervisor who will try to achieve informal resolution. If this fails, the teacher can formally file the grievance with the union, which will attempt to gain satisfaction at a higher management level. If this also fails, there may be a provision for appeal of the grievance to the superintendent or to the school board. If the teacher is dissatisfied with management's final decision on the grievance, many contracts provide for binding arbitration. Although teachers were not singled out in the study, it is interesting to note that a U.S. Department of Labor bulletin reported that about 80% of all the contracts governing state and local employees contain grievance procedures with a provision for binding arbitration.

This type of arbitration is not to be confused with the arbitration of bargaining impasses discussed in the previous chapter. We are

talking here about arbitration to determine whether the school management has violated terms of the contract. While the same person might act as an arbitrator in both situations, the purposes and techniques of bargaining impasse arbitration differ significantly from grievance arbitration. In the former the arbitrator must determine the provisions of a contract while in the latter he must interpret the contract as it applies to a specific factual situation.

Although arbitration of grievances is usually intended to be binding on both parties, thereby precluding court review of the arbitrator's decision, as a practical matter many grievances decided by an arbitrator end up in court. For example, school boards might challenge an arbitrator's decision on the grounds that the contract did not give the arbitrator jurisdiction over the subject matter of the grievance. Or the school board might argue that the arbitrator had no jurisdiction over the grievance because it had not been filed within the specified time limits. The school board might also assert that an arbitrator has no authority to review the board's decision to rescind an illegal contract provision. Each of these legal approaches has been utilized with varying success by school boards unhappy with a purportedly binding grievance arbitration decision.

Similarly, teachers have devised methods to gain a court challenge of arbitration decisions. One is illustrated by the *Belanger* case discussed earlier in this fastback in connection with the duty of fair representation. In that case the teacher was able to get a court to review the merits of an arbitrator's decision, because the teacher argued that in pursuing another teacher's grievance the union violated its duty to represent fairly all teachers in the bargaining unit. Another avenue for gaining review of an arbitrator's decision is opened when the grievance concerns an issue that might arguably fall within the teacher's constitutional or statutory rights. For example, a woman teacher might file a grievance alleging that a less qualified man was promoted in violation of a contract provision requiring promotions to be based on merit. If the teacher loses this grievance before an arbitrator, she still may be able to go into court or to an administrative agency to challenge the man's promotion on the grounds of sex discrimination. The same may apply when a teacher's grievance involves freedom of speech or religion, or race discrimination.

This is not meant to imply that grievance procedures ending in

binding arbitration are ineffective as a means of enforcing the contract. On the contrary, there can be no doubt in the mind of anyone who has worked in a school system with a good grievance procedure that such procedures are an essential component of contract administration. Without grievance procedures a strong contract might be worth little more than the paper on which it is printed. But, with an adequate grievance mechanism, countless disputes are resolved either informally or formally. This not only ameliorates the festering discord that might result from inattention to teachers' problems, it may also give the teachers a healthy realization that legitimate complaints will be dealt with in an equitable manner. Thus, notwithstanding the possibility that some teachers dissatisfied with a grievance decision will file lawsuits, school boards might be well advised to view grievance procedures as a positive element in the administration of the schools.

Some Concluding Remarks

Almost nothing has been said thus far in this fastback about the impact, if any, of collective bargaining on the quality of education in the public schools. This is an issue that should be addressed every time public policy affecting the schools is discussed. Accordingly, some of the actual and imagined impact of collective bargaining on the quality of education will be highlighted in these brief concluding remarks.

There are those who can persuasively argue that collective bargaining has had a decidedly detrimental effect on the schools. They assert that the collective bargaining movement for teachers has bred a trade union mentality instead of a professional dedication to teaching. The side effects of this mentality, according to this position, result in an "I won't do it for nothing" attitude about responsibilities, a preoccupation with union business, and a selfish disregard for the public and the school children. Moreover, we are told that collective bargaining inevitably fragments and polarizes the individuals and groups who should be working cooperatively to provide a decent education. For example, it seems to pit teachers against administrators, union against nonunion teachers, and one teachers union against another. To state it differently, relationships that should be congenial have become adversarial. Finally, those arguing this position point out that collective bargaining has the effect of eroding public support for education. When the public sees teachers picketing school systems, lobbying legislatures, and endorsing candidates, seemingly just to increase the teachers' cut of the pie, it dampens public enthusiasm for a strong financial commitment to education. This eventually will be reflected in the quality of education received by the youngsters in the community.

As always, however, there is a difference of opinion. Teacher unionists will quickly point out that collective bargaining has in the past and will continue in the future to have important beneficial consequences for education. They document this claim by citing provisions in contracts across the nation that establish limits on class size and teaching loads, prohibit school systems from assigning teachers to handle courses outside their areas of certification, and give teachers an important voice in curriculum development. They also might note the More Effective Schools (MES) program, pioneered by the New York City teachers union, whereby ghetto students were given a greatly enriched educational experience in particular schools. Additionally, as mentioned earlier, teachers unions are seeking to further their concept of quality instruction by bargaining for contractual provisions to control the disruptive pupil problem. In short, teacher unionists will argue that rather than detracting from quality education, collective bargaining has been a crucial factor in efforts to improve the schools.

While this debate may run on (although probably with less intensity than 10 years ago), it is realistic to recognize that collective bargaining for teachers is a fact of life in education today and will be at least for the immediate future. This is not to say, however, that dramatic events may not be on the horizon. The long-discussed merger of the NEA and the AFT may become a reality in the years ahead and have a significant effect on the conduct of collective bargaining. The passage of a federal statute governing the labor relations of state and local employees could also have far-reaching ramifications for collective bargaining in the schools. Yet, while the rules may change and the characters may adopt different organizational patterns, the schools will continue to reflect the weaknesses and strengths of our society. If the society as a whole becomes more hostile and loses its ability to resolve disputes voluntarily, this will inevitably be reflected in labor relations in the schools. If, on the other hand, society rejects intransigence and confrontation as behavioral models, labor relations in education will evolve accordingly.

Collective bargaining is merely a process for reconciling the expectations of two parties in order to arrive at a written contract. In large measure, the manner in which this reconciliation is carried out depends on the maturity and tolerance of the participants. These

characteristics are not created in isolation; they are the product of socialization and education. If our society continues to value and teach the peaceful and orderly resolution of conflict, that is the way collective bargaining will be conducted in public education. In the final analysis, it boils down to settling differences of opinion. After all has been said about statutes, court rulings, and the like, the hope remains that teachers and school boards can settle their differences of opinion with civility and with eyes focused on the quality of education.

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